

2013 IL App (2d) 120152-U  
No. 2-12-0152  
Order filed December 30, 2013

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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| MIRABELLA, KINCAID, FREDERICK &<br>MIRABELLA, LLC, | ) | Appeal from the Circuit Court<br>of Du Page County. |
|  | ) |   |
| Plaintiff-Appellee,                                | ) |   |
|  | ) |   |
| v.   | ) | No. 11-SR-1981                                      |
|  | ) |   |
| DENNIS DIOTALLEVI,                                 | ) | Honorable   |
|  | ) | Paul M. Fullerton,                                  |
| Defendant-Appellant.                               | ) | Judge, Presiding.                                   |

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PRESIDING JUSTICE BURKE delivered the judgment of the court.  
Justices McLaren and Spence concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Law firm's judgment for legal fees rendered in marriage dissolution proceeding was not against the manifest weight of the evidence, and trial court did not abuse its discretion in barring defendant from arguing malpractice as a defense because he had a malpractice claim pending in separate action.
- ¶ 2 Plaintiff, Mirabella, Kincaid, Frederick & Mirabella, LLC, filed a small claims complaint against defendant, Dennis Diotallevi, to recover payment for legal services rendered in defendant's marriage dissolution action. Following a bench trial, the trial court entered a judgment against defendant, who appeared *pro se*, in the amount of \$7,347.

¶ 3 On appeal, defendant, who again appears *pro se*, argues that the judgment must be reversed because (1) plaintiffs' fees were excessive and unreasonable and (2) the trial court refused to allow defendant to argue malpractice as a defense. Plaintiff responds that (1) defendant's appeal must be dismissed for his failure to adhere to Supreme Court Rule 341 (Ill. S. Ct. R. 341 (eff. July 1, 2008)) and Supreme Court Rule 342(a) (Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005)), (2) the fee award is not against the manifest weight of the evidence, and (3) "[defendant's] argument that he was denied the right to raise attorney malpractice as a defense belies the record." We affirm.

¶ 4 I. FACTS

¶ 5 On June 28, 2011, plaintiff filed its small claims complaint against defendant to recover payment for legal services. On November 18, 2011, the matter proceeded to a bench trial, where plaintiff produced the parties' fee agreement and copies of plaintiff's bills to defendant. At the outset of the trial, defendant informed the trial court that he was concurrently pursuing a malpractice claim against plaintiff in the circuit court. The trial court took judicial notice of defendant's malpractice action, which defendant had filed the day before the trial in this case.

¶ 6 Joseph Mirabella testified that he represented defendant during the marriage dissolution proceedings until the matter went to trial, at which point Mirabella turned over the matter to John Kincaid, his partner. Mirabella suffered from health problems at the time, and he and defendant agreed that Kincaid would take over to avoid delaying trial. Mirabella testified that Kincaid's experience with estates, trusts, and wills was beneficial to defendant's case, which involved trust documents. Mirabella briefed Kincaid on the case and conferred with him from time to time, but Mirabella did not charge defendant for those services because he did not believe in "double

charging.” Defendant only started complaining to Mirabella about the issue of excessive billing after plaintiff attempted to seek payment on his outstanding balance.

¶ 7 Mirabella testified that he explained plaintiff’s rates during his first or second consultation with defendant. Mirabella’s rate was \$375 per hour for time spent in court and \$350 per hour for non-court time, and the agreement set forth the rates of the other attorneys and paralegals who might work on the case. Mirabella and defendant each signed the fee agreement. Mirabella testified to plaintiff’s procedure for creating records of legal services and billing clients, including defendant. Mirabella admitted that a typographical error caused defendant to be overcharged \$1,125 and that his bill should be reduced accordingly. Otherwise, Mirabella testified that he believed plaintiff performed all the services necessary to represent defendant. According to Mirabella, defendant’s total bill was \$34,443, but \$7,397, including interest and the cost of the small claims action, remained unpaid.

¶ 8 Kincaid testified that, three weeks before trial, defendant authorized him to take over for Mirabella, who was suffering health problems. For 7 hours of work getting up to speed on the dissolution proceeding, Kincaid charged defendant \$2,100. Kincaid’s remaining testimony corroborated Mirabella’s testimony.

¶ 9 During direct examination of Kincaid, defendant attempted to elicit testimony related to trial strategy, the results of the dissolution proceeding, and the way plaintiff’s representation led to those results. The trial court sustained plaintiff’s objections to that evidence on the ground that defendant should raise his claims of malpractice in his separate malpractice action against plaintiff. However, the court later allowed defendant to question Kincaid about certain strategic decisions and how they affected the outcome of the trial.

¶ 10 On cross-examination, Kincaid testified to his preparation for defendant's trial in the marriage dissolution. Kincaid gathered the lengthy case history, including the settlement negotiations, and deposed defendant's ex-wife. Following the trial, Kincaid moved to reconfigure the dissolution judgment because defendant was insistent that his family's interest in certain loans and investments be recognized to prevent his ex-wife from obtaining a windfall.

¶ 11 Defendant testified that he entered into the fee agreement with plaintiff voluntarily and that he received the monthly bills that were the basis of plaintiff's small claims action. However, defendant explained that he "really realized [plaintiff's] level of performance" only after plaintiff withdrew as his counsel following trial.

¶ 12 The trial court summed up defendant's argument as being that defendant believed plaintiff's bills were excessive because Mirabella and Kincaid did not obtain the desired result in the dissolution proceeding. The court found that (1) the parties entered into a fee agreement, (2) defendant never disputed plaintiff's hourly rates, (3) the rates were in line with what other attorneys in the community charge for that type of representation, (4) the work described in the bills was performed, (5) despite defendant's assertions to the contrary, Kincaid taking over the case shortly before trial did not cause him to render incompetent representation. The court concluded that plaintiff was entitled to payment for the hours charged because the work was performed competently and the hourly rate was appropriate for the work performed and for the community standards. The court rejected defendant's contention that plaintiff's compensation should be determined by the outcome of the dissolution proceeding. The court awarded plaintiff the overdue balance plus court costs but denied prejudgment interest.

¶ 13 The trial court entered a judgment against defendant in the amount of \$7,347. On December 13, 2011, defendant filed a motion to reconsider, which was denied on January 18, 2012. Defendant filed a timely notice of appeal on February 9, 2012.

¶ 14 II. Analysis

¶ 15 A. Plaintiff's Motion to Strike Brief

¶ 16 On December 3, 2012, this court struck defendant's original brief for noncompliance with Rules 341 and 342 and granted him leave to refile. Defendant timely filed a new brief, and plaintiff renews its motion to strike on the grounds of continued noncompliance with Rules 341 and 342. "The rules of procedure concerning appellate briefs are rules and not mere suggestions." *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999). The rules are meant to provide instruction to parties in presenting clear and orderly arguments to the reviewing court. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. Noncompliance with the governing supreme court rules is sufficient grounds to dismiss the appeal. *Hall*, 2012 IL App (2d) 111151, ¶ 7.

¶ 17 In violation of Rule 341, defendant's brief lacks (1) a statement in the nature of the case indicating whether the judgment is based upon a verdict of a jury, and whether any question is raised on the pleadings (Ill. S. Ct. R. 341(h)(2) (eff. July 1, 2008)); (2) a concise statement of the applicable standard of review for each issue, with citation to authority (Ill. S. Ct. R. 341(h)(3) (eff. July 1, 2008)); (3) a statement of jurisdiction (Ill. S. Ct. R. 341(h)(4) (eff. July 1, 2008)); (4) a statement of facts necessary to an understanding of the case, stated accurately and fairly without argument or comment and with appropriate reference to the pages of the record (Ill. S. Ct. R. 341(h)(6) (eff. July 1, 2008)); (5) citation to the appellate record in the argument section (Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)); and (6) an appendix as required by Rule 342 (Ill. S. Ct. R. 341(h)(7) (eff. July 1,

2008); (Ill. S. Ct. R. 342(a) (eff. July 1, 2005)). Defendant attempts to rectify the missing appendix by filing a “Supplemental Appendix” with his reply brief, but the appendix fails to include a table of contents to the record on appeal. Ill. S. Ct. R. 342(a) (eff. July 1, 2005). Defendant’s brief contains a single citation to the record on appeal, and he fails to mention his concurrent malpractice action against plaintiff. We recognize defendant’s *pro se* status and unfamiliarity with the briefing requirements, but we admonish defendant for his repeated noncompliance with Rules 341 and 342. Defendant’s violations certainly warrant striking the brief and dismissing the appeal, but we elect to consider the merits of his claims.

¶ 18

B. Reasonableness of Fees

¶ 19 The issue presented is whether the trial court’s judgment in favor of plaintiff is supported by the evidence. We reverse a trial court’s factual findings only if they are against the manifest weight of the evidence, meaning the opposite outcome is apparent or the findings appear to be arbitrary, unreasonable, or not based upon the evidence. *Goldberg v. Astor Plaza Condominium Association*, 2012 IL App (1st) 110620, ¶ 60; *Wildman, Harrold, Allen and Dixon v. Gaylord*, 317 Ill. App. 3d 590, 599 (2000). On appeal, the reviewing court must view questions of testimonial credibility in favor of the prevailing party and must draw from the evidence all reasonable inferences in support of the judgment. A reviewing court will not reverse a trial court’s decision if different conclusions can be drawn from contradictory testimony unless an opposite conclusion is clearly apparent. *Wildman*, 317 Ill. App. 3d at 599.

¶ 20 A reviewing court gives great deference to the trial court’s findings because the trial court, as the trier of fact, is in a superior position to observe the demeanor of the witnesses while testifying, to judge their credibility and to determine the weight their testimony and other evidence should

receive. *Wildman*, 317 Ill. App. 3d at 599. Where the determination of the case depends largely upon the facts in the record, the findings and judgment of the trial court will not be disturbed by the reviewing court if there is any evidence in the record to support such findings. *Wildman*, 317 Ill. App. 3d at 599.

¶ 21 Where an attorney and client enter into an express contract for representation, the terms of the express contract control the compensation due the attorney. *Wildman*, 317 Ill. App. 3d at 601. Unlike fee petitions and claims for *quantum meruit* fees, in which the trial court makes an independent valuation of reasonable attorney fees, an express contract governing the compensation due an attorney makes the hourly rate agreed to by the parties the starting point of the court's analysis. *Wildman*, 317 Ill. App. 3d at 601. However, compensation due an attorney pursuant to an express contract must satisfy certain professional standards. Rule 1.5 of the Illinois Rules of Professional Conduct requires that all fees for legal services be reasonable and sets forth the following factors to be considered in determining the reasonableness of the fees:

- “(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.” Ill. S. Ct. R. 1.5(a) (eff. Jan. 1, 2010).

¶ 22 The trial court found that the parties entered into a valid, written attorney fee contract; the parties did not dispute plaintiff’s hourly rates; and those rates conformed to rates for marriage dissolution proceedings in Du Page County. Moreover, the court found that all of the legal work was performed competently and was reasonable and necessary. The court rejected defendant’s assertion that his disagreement with Kincaid’s strategic decisions is a defense to paying for the legal services. In entering judgment for plaintiff, the court denied prejudgment interest and accounted for plaintiff’s admitted typographical error that caused defendant to be overcharged. The court determined that the compensation due plaintiff pursuant to the express contract with defendant satisfied the professional standards of section 1.5(a) and that determination is not against the manifest weight of the evidence.

¶ 23 The court’s findings are not unreasonable, arbitrary, or not based on the evidence. Plaintiff introduced evidence that Kincaid had been a licensed attorney since 1963, having tried 200 jury and bench trials to verdict, including two dozen marriage dissolution cases. The court heard testimony that diverse issues of trusts, corporations, and mortgages complicated defendant’s dissolution proceeding and that Kincaid had extensive experience in such matters. When Mirabella became incapable of following through with the trial, defendant insisted that the case move forward and agreed that Kincaid should take over the case as substitute counsel on short notice. The court admitted into evidence the attorney fee contract and the detailed monthly bills submitted to defendant from July 2009 to July 2011. The bills described the work performed and itemized charges. Defendant does not cite to any specific legal work that he did not authorize.



¶ 24 In arguing that plaintiff's fees are unreasonable and excessive, defendant obliquely suggests that plaintiff acted unethically in failing to communicate the basis for the fee rates in violation of Rule 1.5(b) (eff. Jan. 1, 2010). At trial, defendant elicited testimony from Kincaid that he charged more for his time than was shown in the attorney fee contract. Plaintiff's exhibits showed that Kincaid's rates went from \$250 to \$300 per hour for non-court time and \$275 to \$300 per hour for time spent in court.

¶ 25 Rule 1.5(b) provides that the rate of the attorney fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Ill. S. Ct. R. 1.5(b) (eff. Jan. 1, 2010). Rule 1.5(b) further provides that any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Ill. S. Ct. R. 1.5(b) (eff. Jan. 1, 2010).

¶ 26 Kincaid testified that he explained his rates to defendant and that defendant did not object. Further, the attorney fee contract provided that "[defendant] agrees to pay periodic increases in the rates charged by paralegals and attorneys," and "[defendant] should review each billing statement promptly and address any objection or error in a timely manner." Defendant does not allege that he did not receive timely bills, and plaintiff offered testimony that defendant did not object to any of the charges until plaintiff attempted to collect the unpaid balance months later. Any increase in rates is not a basis for reversing the judgment.

¶ 27 C. Malpractice

¶ 28 Defendant further argues that the trial court should have allowed him to claim malpractice as an affirmative defense to plaintiff's complaint for unpaid legal fees. Plaintiff argues that

defendant's claim is forfeited because he did not file a counterclaim or an affirmative defense before trial.

¶ 29 By arguing malpractice as a defense to plaintiff's action and filing his own separate complaint, defendant does not make clear whether he intends his malpractice allegation to be an affirmative defense or a setoff to plaintiff's damages. We note that an affirmative defense is designed to defeat a defendant's liability to a plaintiff, whereas a setoff is a type of counterclaim that is designed to mitigate the damages that a liable defendant owes to a plaintiff. *Nadhir v. Salomon*, 2011 IL App (1st) 110851, ¶ 37. Counterclaims are controlled by section 2-608 of the Code of Civil Procedure (735 ILCS 5/2-608 (West 2012)), whereas affirmative defenses are controlled by section 2-613 (735 ILCS 5/2-613 (West 2012)). Regardless, we conclude that defendant did not forfeit his malpractice claim by not filing a counterclaim or affirmative defense before the trial in this case.

¶ 30 Small claims cases like this one are less formal than other proceedings, and issues such as counterclaims and affirmative defenses that normally must be raised in the answer to the complaint need not be specifically pled in written pleadings. See Ill. S. Ct. R. 286(a) (eff. Aug. 1, 1992) ("If the defendant appears, he need not file an answer unless ordered to do so by the court; and when no answer is ordered the allegations of the complaint will be considered denied and any defense may be proved as if it were specifically pleaded"). Contrary to plaintiff's assertion, defendant did not need to file a formal answer with a counterclaim or an affirmative defense to preserve his allegation of malpractice.

¶ 31 In Illinois, counterclaims are generally permissive rather than mandatory, and therefore, a defendant generally may raise his claim against the plaintiff in the original action by way of a counterclaim or by way of a separate action. *Kasny v. Coonen and Roth, Ltd.*, 395 Ill. App. 3d 870,

873 (2009). However, in this district, the law is settled that an attorney's claim for fees and a client's claim for malpractice are deemed to be a single cause of action, such that a counterclaim ordinarily is mandatory. *Kasny*, 395 Ill. App. 3d at 874.

¶ 32 At the outset of the small claims trial for fees, defendant attempted to raise the issue of malpractice but was barred from doing so after alerting the trial court that he had filed in the circuit court a separate action for legal malpractice in part as a setoff to mitigate plaintiff's claim for unpaid fees. Accordingly, the trial court prohibited defendant from arguing the issue of malpractice on the ground that he had chosen to pursue that claim in a separate action. When defendant began to address issues of malpractice during trial, the court reminded defendant of his separate action and told him the court handling that case would be the appropriate venue to argue the claim. Later, the trial court attempted to mitigate any potential prejudice to defendant by allowing him to question Mirabella and Kincaid about certain trial tactics as they related the reasonableness of the attorney fees. The trial court's ruling is consistent with defendant's decision to pursue his claim in a separate action, and we conclude that the trial court did not abuse its discretion.

¶ 33 Under *Kasny*, the best course would have been for defendant *not* to file the separate action, but rather raise his malpractice claim as part of plaintiff's action. The attorney fee claim and the malpractice claim should have been tried at the same time, but defendant's decision to pursue a separate action prevented that. The trial court's decision to bar evidence of malpractice merely reflected defendant's decision.

¶ 34 Defendant argues that he should have been permitted to argue malpractice in this case because, under the doctrine of *res judicata*, there is a nexus between his malpractice claim and his defense of plaintiff's claim for attorney fees. Although defendant's argument does not compel

reversal in this case, we note that *res judicata* should not operate as a bar to defendant's malpractice claim in his subsequently-filed action. Where the defendant's claim involves the same operative facts as the plaintiff's claim, such as plaintiff's claim for fees and defendant's claim for malpractice, *res judicata* may bar the defendant from raising his or her claim in a subsequent action. *Kasny*, 395 Ill. App. 3d at 873. Specifically, *res judicata* bars a subsequent action if successful prosecution of that action would in effect nullify the judgment entered in the initial action. *Kasny*, 395 Ill. App. 3d at 873. The doctrine bars not only all claims actually resolved in the former suit, but also any claims that could have been raised. *Kasny*, 395 Ill. App. 3d at 873. In this case, the court barred defendant from raising his malpractice claim in plaintiff's original action for fees. Because defendant could not raise his claim in the original action, *res judicata* is not a bar to him raising that claim in a separate action. We emphasize that we have no opinion on the merit of that claim, only that *res judicata* is not a ground for dismissal.

¶ 35

### III. CONCLUSION

¶ 36 The record indicates that the trial court reviewed the attorney fee agreement, examined plaintiff's rates, and reviewed the subsequent bills sent to defendant. The court found that the fees conformed to the community standard and the work was necessary and completed competently. Plaintiff acknowledged a typographical error in one bill, and the court reduced the judgment, accordingly. The judgment is not against the manifest weight of the evidence. Moreover, the court did not abuse its discretion in barring defendant from arguing a legal malpractice defense, in light of defendant's choice to pursue the malpractice claim in a separate action pending in the circuit court.

¶ 37 For the preceding reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 38 Affirmed.